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# Introduction: The Triangulation of International Intellectual Property Law: Cooperation, Power, and Normative Welfare

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## INTRODUCTION: THE TRIANGULATION OF INTERNATIONAL INTELLECTUAL PROPERTY LAW: COOPERATION, POWER, AND NORMATIVE WELFARE

Peter M. Gerhart<sup>†</sup>

The articles appearing in this symposium issue were developed for a conference held at our law school on March 26, 2004 entitled “The Future of International Intellectual Property: The International Relations of Intellectual Property Law.” Together with papers delivered at the conference but published elsewhere, and some work not yet published,<sup>1</sup> the day was devoted to exploring the future of international intellectual property law by attempting to understand the forces that influence it and the methods by which we determine the welfare effects of the system. The conference—a follow up to our earlier commitment to this field<sup>2</sup>—consisted of scholars from two related, but distinct traditions—one group whose primary background has been in international relations theory and the others whose primary background has been in intellectual property theory. The intermixture was deliberate, reflecting a belief that each discipline must rely on insights from the other in order to complete our understanding of what might lie ahead.

In this introduction, I propose to summarize the broad themes that I saw emerge from the conference, and to show how the papers presented in the conference relate to one another. Let me therefore proceed from a broad, thematic perspective to a narrower one, focusing first on what we tried to accomplish in the conference, then on what themes came out of the

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<sup>1</sup> Because the conference was conceived to be a conversation among experienced and thoughtful experts, rather than simply a presentation of papers, participants were given an opportunity, but were not required, to publish a paper in this symposium issue. In addition to those whose papers are published here, the following scholars made presentations at the conference: Ruth Okediji, the William L. Prosser Professor of Law at the University of Minnesota, Kal Raustalia, Professor of Law at UCLA, Jerome H. Reichman, the Bunyan S. Womble Professor at Duke Law School (who presented the paper cited *infra* note 4), Pamela Samuelson, Professor at Boalt Hall School of Law & Information Management & Systems at the University of California (who presented her paper *Intellectual Property Arbitrage: How Foreign Rules Can Affect Domestic Protections*, 71 U. CHI. L. REV. 223 (2004), and Gregory C. Shaffer, Professor at the University of Wisconsin law school (who, in a work-in-progress entitled *International Law as Power: A Taxonomy*, presented an overview of the treatment of “power” under various approaches to international relations and related them to international intellectual property law).

<sup>2</sup> Peter M. Gerhart, *Special Introduction. Reflections: Beyond Compliance Theory--TRIPS as a Substantive Issue*, 32 CASE W. RES. J. INT'L L. 357 (2000).

conference, and finally on a consideration of how the reader might understand the individual contributions in light of the overall themes that I identify.

We initiated this symposium to marry two different analytical perspectives—the perspective of intellectual property and the perspective of international relations. Driven by the new technologies of communication and transportation and the concomitant increase in international diplomacy over knowledge goods,<sup>3</sup> international intellectual property has entered a period of renewed and sustained vigor.<sup>4</sup> The TRIPS agreement administered through the World Trade Organization (WTO)<sup>5</sup> requires all members (and those states that want to be members) to enact minimum standards of intellectual property protection and to set up procedures by which intellectual property owners can protect their rights. Along with renewed energy in the World Intellectual Property Organization (WIPO)—the international organization that has traditionally dealt with transnational intellectual property issues—the current round of global and regional trade negotiations seek, paradoxically, both to relax<sup>6</sup> and to enhance<sup>7</sup>

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<sup>3</sup> Analysis of international intellectual property in a trade regime is increasingly seen as relating to the production and distribution of knowledge goods, reflecting that intellectual property law creates a legal package within which knowledge can be produced, hoarded, and transferred. *See generally*, KEITH MASKUS & J.H. REICHMAN (eds.), *INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME* (forthcoming 2004)[hereinafter *INTERNATIONAL PUBLIC GOODS AND INTELLECTUAL PROPERTY*] and PETER DRAHOS & JOHN BRAITHWAITE, *INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY?* (2002).

<sup>4</sup> The literature on international intellectual property has grown substantially in the past ten years. Two perspectives appear to dominate the literature. The rights (or wealth based) perspective emphasizes intellectual property owners' legitimate claims to compensation for their contribution to society, the notion of theft or piracy of that property, and the importance of protecting intellectual property in order to facilitate international trade and investment. *See e.g.*, ROBERT M. SHERWOOD, *INTELLECTUAL PROPERTY AND DEVELOPMENT* (1990). The knowledge based perspective sees intellectual property in instrumental terms, and emphasizes both the need for incentives for the generation of new knowledge and the limitations on those incentives for those who need access to that knowledge. *See e.g.*, Keith E. Maskus & Jerome H. Reichman, *The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods*, 7 J. INT'L ECON L. 279 (2004), Report of the Commission of Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy* (2002), available at [http://www.iprcommission.org/graphic/documents/final\\_report.htm](http://www.iprcommission.org/graphic/documents/final_report.htm) (last visited Sept. 19, 2004). The economic evidence is collected and analyzed in KEITH E. MASKUS, *INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY* (2000).

<sup>5</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 33 I.L.M. 81 (1994) [hereinafter *TRIPS*].

<sup>6</sup> The current round of WTO multilateral negotiations, the so-called Doha Round, is exploring ways of improving access to essential medicines within the context of the TRIPS

international standards. Simultaneously, the international relations field, freed from the grips of a bi-polar world dominated by major security competition, is searching for ways to use its considerable set of analytical tools, themselves reflecting the cohabitation of economics and political science, to understand how the transnational world works. Although the marriage between international relations and intellectual property was natural, and, indeed, inevitable, the couple is coping with the usual adjustments from any such union—how to meld analytical perspectives that are complimentary but distinct, how to deal with redundancy when the cultures overlap (that is, which copy of *Moby Dick* to keep), and how to deal with different language (you say *tomato* and I say tomato). The new culture generated by the amalgamation of these two perspectives is itself interesting to watch.

### *I. The Substance/Process Dichotomy*

We get a good understanding of the relationship between the international relations perspective and the international intellectual property perspective if we examine each perspective along the familiar substance/process dichotomy. Recognizing that there is no way fully to separate the substantive or normative dimension of intellectual property from the procedural issue of how the law is made, we can understand the relation between the two perspectives if we understand the way that each perspective approaches the substance/process dichotomy, and then look to how the mixture of the two allows the two perspectives to work in tandem.

By and large, the core concern of intellectual property scholars who study international intellectual property is normative. They want to know how we can permit the broadest possible access to existing knowledge without undercutting the incentives needed to generate a high rate of new knowledge. This substantive, normative focus on the appropriate balance between the incentive effects and the access effects of intellectual property

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framework. This is generally understood to constitute a TRIPS-minus agenda, permitting developing countries to take advantage of the access flexibilities built into TRIPS, and, in some cases, providing new sources of access. See Peter M. Gerhart, *Slow Transformations: The WTO As a Distributive Organization*, 17 AM. U. INT'L L. REV. 1045 (2002). For an update on the TRIPS-minus negotiations see Bryan C. Mercurio, *TRIPS, Patents, and Access to Life-Saving Drugs in the Developing World*, 8 MARQ. INTELL. PROP. L. REV. 211 (2004).

<sup>7</sup> As our conference papers make clear, the United States has been using bi-lateral and regional trade agreements to enhance the protection of intellectual property through free trade agreements with individual or regional trading partners. This agenda is now known as the TRIPS-plus agenda. See e.g., Peter Drahos, *Securing the Future of Intellectual Property: Intellectual Property Owners and their Nodally Coordinated Enforcement Pyramid*, 36 CASE W. RES. J. INT'L L. 53 (2005) and Carlos M. Correa, *Bilateralism in Intellectual Property: Defeating the WTO System for Access to Medicines*, 36 CASE W. RES. J. INT'L L. 79 (2005).

is the central concern of domestic intellectual property—and heretofore the concern of states acting in relative isolation. Now that markets, including markets for knowledge goods, are transnational and global, that traditional question is transposed to the family of states. Here, the principle of territoriality<sup>8</sup>—that is, the principle that intellectual property law is primarily the creation of states and is confined to the borders of states—induces intellectual property scholars to ask the following central question: is the sum of the intellectual property systems of heterogeneous states, as influenced through international intermediation and institutions, enhancing global welfare or not? The focus is inevitably normative, with some metric of social welfare serving as the focal point for analysis.<sup>9</sup>

International relations scholars, by contrast, focus first on process. They ask why, how, and to what effect nations interact, both directly with each other, and also through, and with, international institutions.<sup>10</sup> They model states as actors, looking inside states to understand how the interests and values of the state are formed, and looking outside states to understand how the interests and values of one state interact with, and are influenced by, the interests and values of other states and people in other states.<sup>11</sup>

Of course, substance and process are never far apart. As our conference participants made clear, intellectual property scholars resort to procedural analysis to support their normative orientation, just as international relations scholars resort to substantive analysis as they appraise international processes. That is what makes this marriage between the two perspectives such a natural one—the two perspectives cannot be separated and each reinforces the other. Although the primary interest of intellectual property scholars is on systems for maximizing the allocation of resources for the production of knowledge, when they work in the international sphere, international intellectual property scholars have been drawn into thinking about how national systems interrelate and how international institutions affect national systems. Similarly, although the international relations scholars seek to understand the inter-state and intra-state forces that shape internationalization, those process concerns are

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<sup>8</sup> See, e.g., GRAEME B. DINWOODIE, WILLIAM O. HENNESSEY, AND SHIRA PERLMUTTER, *INTERNATIONAL INTELLECTUAL PROPERTY LAW AND POLICY* 28-34 (2001).

<sup>9</sup> See, e.g., Elhanan Helpman, *Innovation, Imitation, and Intellectual Property Rights*, 61 *ECONOMETRICA* 1247 (1993) (evaluating welfare effects of international intellectual property along several dimensions).

<sup>10</sup> For international relations perspectives on international intellectual property see SUSAN K. SELL, *PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS* (2003) and MICHAEL RYAN, *KNOWLEDGE DIPLOMACY: GLOBAL COMPETITION AND THE POLITICS OF INTELLECTUAL PROPERTY* (1958).

<sup>11</sup> See, e.g., Kenneth W. Abbott & Duncan Snidal, *Values and Interests: International Legalization in the Fight Against Corruption*, 31 *J. L. STUD.* S141 (2002).

generally grounded on some assumptions, or assertions, about the welfare impact of various types of interactions.

What is interesting, however, is to trace the ways in which substance and process interrelate in this setting, and the ways in which scholars from the different settings trace those relationships. What difference does it make if one uses process as the handmaiden of normative analysis—analyzing the normative validity of international law by analyzing the process by which it was made—or if one uses normative analysis as the handmaiden of process—analyzing the process by which law is made by appraising its normative impact?

When we follow this substance/process dichotomy as it was revealed in the work of the scholars who graced our conference, we can begin to discern that each analytical perspective advances its claims in the midst of significant ambiguity—that is, each analytical perspective is built around assertions or assumptions that are themselves contestable, and that therefore threaten to upset or undermine the analysis that is based on that perspective. As we examine these ambiguities, we can see how the ambiguity of one perspective can be addressed from the perspective offered by the other field; the resources of one perspective become the means of addressing the ambiguities of a different perspective. Without multiple perspectives we are left with ambiguity, but when we bring multiple perspectives to bear we can begin to address the ambiguities. We cannot, in other words, bring our topic into full focus without bringing multiple perspectives to bear on the topic.

## *II. The Ambiguities of Cooperation, Power, and Normative Welfare*

Let me illustrate this point by concentrating on three analytical perspectives that drove our conference: the nature of international cooperation, the role of power in the international system, and the normative assessment of the appropriate international regime for knowledge goods. I first examine each analytical perspective and the ambiguity that arises from that perspective; I then examine how one analytical perspective might be used to address the ambiguities of a different perspective. My conclusion is that given the ambiguity of cooperation, the ambiguity of power, and the ambiguity of normative analysis, no one analytical perspective can give us a full picture of the way the world works and of the impact of the way the world works on the welfare of the world. Triangulation is called for, with the perspectives being combined in a way that bring each ambiguity into focus, thereby reducing it to the extent possible. Let me expand on this point by examining the nature of the ambiguities and how they can be resolved.

## A. The Ambiguity of Cooperation

International relations scholars work around a large black hole. We know that states cooperate—that is, that they do things jointly and interact in ways that change each other's behavior by changing each other's values and interests. We have rich theories that explain why and how states cooperate,<sup>12</sup> how international institutions evolve,<sup>13</sup> how international institutions, regimes and law affect state behavior,<sup>14</sup> and how transnational networks—both within<sup>15</sup> and outside<sup>16</sup> government—affect state behavior. Yet, we have no good metric for determining whether the gains of that cooperation are divided equally, or whether, indeed, there are reciprocal gains at all. Admittedly, we can begin any analysis of cooperation with the presumption that when states cooperate it is because cooperation improves the joint welfare of the negotiating states in some way. Why else would

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<sup>12</sup> See, e.g., Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in *INTERNATIONAL REGIMES 1* (Stephen D. Krasner ed., Cornell University Press 1983) (articulating regime theory as a theory of cooperation); Jack L. Goldsmith & Eric A. Posner, *Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective*, 31 J. LEGAL STUD. S115 (2002) (articulating a rational choice framework for understanding international cooperation); ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY*, 85-109 (1984) (articulating “neoliberal” theory based on need to overcome bargaining failures); ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 27 (1995) (articulating theory that states gain power, and therefore sovereignty, by cooperation); Ryan Goodman & Derek Jinks, *Toward an Institutional Theory of Sovereignty*, 55 STAN. L. REV. 1749 (2003) (seeing the state as embedded in a social community of states, which binds states in order to reflect shared values and to empower states); and Oona Hathaway, *The Cost of Commitment*, 55 STAN. L. REV. 1821 (2003) (exploring the dynamics of commitment when a country does not receive a reciprocal benefit from other countries).

<sup>13</sup> See generally, *Special Issue, The Rational Design of International Institutions*, 55 INT. ORG. 761 (2001).

<sup>14</sup> See, e.g., THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995) (seeing international cooperation leading to a convergence around norms of fairness); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L. J. 2599, 2602 (1997) (emphasizing the way the interaction between states leads to norms that become internalized into national legal systems), and RICHARD FALK, *LAW IN AN EMERGING GLOBAL VILLAGE: A POST-WESTPHALIAN PERSPECTIVE* (1998) (arguing that increased cosmopolitanism will restructure state interests and therefore the stability of cooperation).

<sup>15</sup> ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004) (describing the transnational networks of government officials that influence state behavior and therefore form a new type of international governance).

<sup>16</sup> See, e.g., *GLOBALIZATIONS AND SOCIAL MOVEMENTS: CULTURE, POWER, AND THE TRANSNATIONAL PUBLIC SPHERE* (John A. Guidry et al. eds., 2000); MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS, ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998).

they cooperate? But cooperate is a tricky term. A person who surrenders his wallet at gun point is cooperating (in one sense), but we would hardly view that situation to be one of joint gains (except in the limited sense that the person surrendering his wallet is better off doing so than being harmed).

In other words, theories of cooperation often assume that the fact that states cooperate must mean that the cooperation makes both parties better off, and, as an extension, they often assume that both parties are better off by the same amount of welfare. However, we cannot assume the welfare effects of cooperation. There is no *a priori* way of measuring the welfare effects of cooperation from the fact that states have signed a treaty or set up an international institution or otherwise changed their behavior in response to stimuli provided by other states.<sup>17</sup> There are enough instances of redistributive cooperation—cooperation that, because it results from power, yields either asymmetric or no joint gains<sup>18</sup>—to make us wary of simply assuming that cooperation enhances welfare. The fact that states “cooperate” does not necessarily translate into joint gains, and it certainly does not necessarily mean that gains are jointly divided in a way that would meet a common standard of fairness.

What international relations theorists therefore desperately need is a metric for distinguishing “good” cooperation from “bad” cooperation, both to distinguish instances of joint welfare gains from instances of coercion, and also to determine whether welfare gains are equally divided, and whether it matters. Without such a metric, the cooperation that appears to be welfare enhancing, and therefore stable, may in fact be welfare decreasing and unstable.<sup>19</sup>

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<sup>17</sup> Analysts make this point implicitly when they suggest that we cannot understand, or evaluate, international regimes without understanding the power that led to those regimes. See, e.g., Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT’L ORG. 339 (2002), and Richard H. Steinberg, *Great Power Management of the World Trading System: A Transatlantic Strategy for Liberal Multilateralism*, 29 LAW & POL’Y INT’L BUS. 205 (1998). One of our conference participants has done an especially effective job of exploring the imbalance in various forms of power that are embedded in the WTO system. See, e.g., Gregory Shaffer, *Recognizing Public Goods in WTO Dispute Settlement: Who Participates? Who Decides?*, 7 J. INT’L ECON. L. 459 (2004) (showing how power is reflected in the way countries use the dispute resolution process); Gregory C. Shaffer, *The Nexus of Law and Politics: The WTO’s Committee on Trade and Environment*, in *THE GREENING OF TRADE LAW, INTERNATIONAL TRADE ORGANIZATIONS AND ENVIRONMENTAL ISSUES* (Richard H. Steinberg ed., 2002). See also, Peter Drahos, *When the Weak Bargain with the Strong: Negotiations in the World Trade Organization*, 8 INT’L NEGOTIATION 79 (2003).

<sup>18</sup> See, e.g., Thomas Oatley and Robert Nabors, *Redistributive Cooperation: Market Failure, Wealth Transfers, and the Basle Accord*, 52. INT’L ORG. 35 (1998).

<sup>19</sup> We can, in other words, evaluate any form of cooperation either on the ground that the cooperation improves, or fails to improve, some normative measure of welfare, or on the ground that the cooperation is destabilizing rather than stabilizing. Often cooperation that



There are, of course, two ways of filling the black hole left by the unsupported assumption that joint activity yields joint and symmetrical gains. One way is to study directly the power relationships that lead to cooperation and to analyze cooperation in terms of the power that shaped the cooperation. Because the division of gains from cooperation will reflect the relative power of the bargainers, if a metric existed for understanding the relative power of states we would have a basis for making a judgment about how the gains from cooperation are divided. For example, if the bargaining power of the states in a negotiation is evenly distributed, we might justifiably assume that each party will insist on a roughly equal division of the benefits of cooperation. If, by contrast, we have a David negotiating with a Goliath, we can assume that the gains will be distributed in accordance with their relative strengths. Yet, as I will make clear in a minute, power is itself an ambiguous concept, not only because it is difficult to measure, but also because it can be used for both good and evil.

If we cannot resolve the ambiguity of cooperation by examining the nature of the power relationships that led to the cooperation, perhaps we could resort to the second method of helping to address the ambiguity—that is, we might develop a metric for measuring the normative welfare outcome of any cooperation. If we had such a metric, we could distinguish and evaluate various states of cooperation; some cooperation would be found to “unfairly” divide the gains of cooperation (as defined by our normative metric) and others would not. Yet, developing such a normative metric is also fraught with ambiguity, as we shall see shortly, and that ambiguity identifies another analytical gap that must be filled. We therefore need to understand both the ambiguity of power and the ambiguity of normative analysis in order to understand how we might evaluate cooperative solutions in a more comprehensive way, and to see how we might use our lenses of cooperation, power, and normative analysis to triangulate international intellectual property.

## **B. The Ambiguity of Power**

As I have said, if we had a good metric for measuring the impact of power on cooperation, we might address the ambiguity of cooperation by trying to determine the ways in which the exercise of power has influenced the cooperation. If cooperation resulted from evenly distributed bargaining power we could assume that the benefits of cooperation were roughly evenly divided; if cooperation were achieved at the point of a gun, we could

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normatively reduces welfare will be destabilizing for that reason. But even cooperative systems that improve the welfare of all parties may prove to be unstable if the distribution of gains makes a member of the system so resentful that the member defects from the regime (either explicitly or implicitly).

assume that the benefits were not evenly divided. Aside from the difficulty<sup>20</sup>—some would say impossibility—of developing such a metric,<sup>21</sup> even when power is used there is an ambiguity inherent in the use of power—an ambiguity that ran throughout our conference. The ambiguity of power is that power can be exercised for good as well as for evil. The fact that power is exercised appears to be troubling by itself—especially for those who do not have it—but if it is wielded for good rather than for ill, it is objectionable only if process trumps substance. Both governance in general and the rule of law in particular represent exercises of power, and are not subject to criticism for that reason alone. A system with an altruistic Hegemon might be preferable to a system with widely dispersed, but diabolical, power. Power is not, by itself, the problem.

In order to incorporate effectively a consideration of power into the analytics of cooperation we must overcome three obstacles. The first obstacle, already alluded to, is to define an analytics of power that allows us to determine whether power has been used and what its effects are. Power is easy to assert, but hard to measure. We know that states search for power during negotiations, either by building coalitions or breaking coalitions, either by enhancing their information or belittling other's information, and by both bluff and threat. But at the end of the day we have no basis for measuring the impact of power on the negotiations. Even a David can best a Goliath by exploiting a weakness.

Moreover, even if we had appropriate analytical tools for the task of tracing the effect of power on outcomes, we would also have to determine when the use of power is for good, rather than for ill. As Ruth Okediji reminded us at the conference, under the current international system, we entrust the welfare of people to states. If states are dysfunctional, then intervention that overcomes that dysfunction may make people better off rather than worse. Again, there are enough instances of power being used

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<sup>20</sup> The difficulty of distinguishing between cooperation that results from power and cooperation that does not is widely embedded in the literature about globalization. *See, e.g.,* ROBERT Z. LAWRENCE, ALBERT BRESSAND & TAKATOSHI ITO, *A VISION FOR THE WORLD ECONOMY: OPENNESS, DIVERSITY AND COHESION*, 28-43 (1996) (distinguishing "imperial harmonization" from "competitive convergence").

<sup>21</sup> We understand, of course, that power in a cooperative setting depends on the options that a state has if it decides not to cooperate; the more options a state has to achieve its goals in a non-cooperative way, the more credible are its threats to avoid, or defect from, cooperation. Accordingly, alternatives are the source of bargaining power because they frame the importance of cooperation to the state. Yet, it is never clear what weight particular options have as a source of leverage in negotiations. Even a state with many options will have a particularized need that it cannot meet in any other way. Moreover, if a state misunderstands its options, it may choose non-cooperative solutions that make it worse off. Bargaining partners that understand this will not be influenced by the options a state thinks that it has.

for good that we should be wary of any analysis that does not differentiate the use of power from the misuse of power.

Yet, even if we can discern the “good” use of power from the “bad” use of power, we face a third difficulty in developing an analytics of power—namely, that even if power is exercised to do substantive good unambiguously, there may still be instances where the damage done to process values by the use of power outweighs the normative good that the power does. Sometimes process values trump normative values because achieving legitimate ends by illegitimate means may so destabilize a social system as to lead, ultimately, to less welfare rather than more. The use of power implicates both normative and process values, and we cannot praise power for its normative results without also examining the impact of the use of power on process values. This requires that we have a way of understanding how process values enter into the utility functions of the states.

Accordingly, the ambiguity of power presents significant difficulties for any approach that seeks to overcome the ambiguity of cooperation by resorting to a direct assessment of the impact of power on the nature of cooperation. We might turn to normative analysis to fill the gap, but here too we find substantial ambiguities that complicate the analysis.

### C. The Ambiguity of Normative Analysis

In an ideal world, we could use normative analysis to help us resolve the ambiguities of cooperation and power. Normative intellectual property analysis would be able to tell us whether a system of norm creation is used for good or for ill based on an analysis that measures the values that are important to a particular vision of human welfare—for example on the incentives for creating, and gaining access to, new knowledge. Of course, we would have to specify and defend a conception of human welfare, and that issue is deeply contestable,<sup>22</sup> but in principle if we could specify a

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<sup>22</sup> I have already referred to the difference between a rights based, deontological approach to intellectual property and an instrumentalist, consequentialist approach, *see supra*, note 4. The deontological approaches to intellectual property are derived from Lockean property theory, as applied in various theories of individual rights. It is very much associated with the philosophy of Robert Nozick. *See* ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 178-182 (1974). Among the most noteworthy deontological approaches to general welfare analysis is that of John Rawls, where the distributional aspects of human welfare predominate. JOHN RAWLS, *A THEORY OF JUSTICE* 245-248 (1999). Among consequentialist theories, the maximization of wealth often serves as a measure of human welfare, but wider conceptions of human welfare, including distributional consequences, are possible through a consequentialist approach. LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* 21-23 (2002), (suggesting that social welfare can take into account one person's interest in the welfare of others, and thus incorporate fairness values as one of the consequences that matters). *See also*, AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (2000) (suggesting that

metric for measuring human welfare we would be able to trace the impact of any legal regime on that metric, and that would help us to assess and evaluate the nature of both cooperation and power. For example, if we specified that the welfare effects of any international regime must be evenly shared among all countries, we could look at the welfare effects of any regime and then evaluate the nature of the cooperation and the power that underlies that regime. A regime that yields joint gains, evenly distributed, would allow us to infer that the cooperation was joint-benefit maximizing and that it was not influenced by power. By contrast, a regime that yielded asymmetrical gains or even one-sided gains would be seen to have the indicia of redistributive cooperation. Working backwards we could then identify which aspects of cooperation and which aspects of the use of power seem to be causal indicators of the outcome that either conforms to, or detracts from, our specified notion of welfare.

Not surprisingly, we do not live in this ideal world of normative acuity. Several of the problems are well known—the two most prominent ones being the difficulty of defining and then measuring welfare. We were reminded at several points in the conference of the substantial debate over the precise welfare effects that attend any change in intellectual property laws. In addition, we agreed that debates about the definition and measurement of the welfare effects of intellectual property are rife, even in domestic intellectual property systems. These ambiguities are augmented when we are dealing with an international, rather than a national, system. The general problems involved in defining the welfare effects of national intellectual property policy are exacerbated in the international field by the distortions that the international system brings to intellectual property lawmaking. Whatever the precise shape for intellectual property that is best for a state when it thinks of its welfare in isolation, when that state considers its position on international intellectual property law, the state's welfare calculus changes. The fact is that when intellectual property is projected into the international field, the search for balance between incentives and access yields to either the search for wealth (for intellectual property exporters) or the search for access (for intellectual property importers), and any national interest in a balanced regime internally gives way to an interest in an external regime that is imbalanced—one that will therefore be imbalanced to meet the interests of the states with the most bargaining power.<sup>23</sup>

In other words, international intellectual property regimes are not made through a search for the right balance between incentives and access because the states that make the regime are not, individually, looking for

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maximizing individual potential could fruitfully bridge the gap between consequentialist and deontological approaches).

<sup>23</sup> See Peter M. Gerhart, *Why Lawmaking for Global Intellectual Property is Unbalanced*, 22 E.I.P.R. 309 (2000).

that balance in the international sphere. Each state is looking for an international regime that reflects that state's interests. Whether that results in an international system that is "balanced" in some sense of global welfare is not a reflection on what the parties are searching for individually, but simply of the happenstance that the negotiating power of the states is distributed in a way that happens, almost by coincidence, to reach that result.

In any event, there is simply no metric for determining whether the global welfare delivered by an international system is optimal. It is difficult enough to aggregate the different preferences within a state to determine what is in a state's interest, and even more difficult to determine how appropriately to compare the welfare of one state with that of another state. Lacking such a metric, even intellectual property scholars are forced to resort to an analysis of the process by which international intellectual property is made in order to make some judgments about the substantive wisdom of the laws that are evolving. The ambiguities of normative analysis require us to resort to process analysis, and therefore to resort either to the analytics of cooperation or the analytics of power.

In other words, our conference traced three broad focal points for understanding the future of international intellectual property: theories of cooperation, theories of power, and theories of normative welfare. Any one of these themes tells us something about the future of intellectual property, but each theme needs to be supplemented by at least one of the other themes in order to provide a meaningful contribution to our understanding of the forces that shape the international regimes. Analysts who start from the lens of cooperation can say that because the international system reflects a cooperative outcome, it must increase global welfare, but they cannot say that with confidence unless they can also rule out the possibility (based on the lens of power) that the cooperation was really coerced, or redistributive, or (alternatively) unless they can provide a metric of the normative welfare effects of the cooperation that is widely accepted. Analysts who start from the lens of power can portray the international intellectual property regime as problematic because it is derived from an imbalance of negotiating power, but they cannot say anything meaningful about the international system unless they can also argue (from the normative perspective) that the use of power has reduced (rather than improved) global welfare, or subverted systemic values in a meaningful way. Finally, analysts who focus first on the normative welfare impacts of intellectual property regimes are unable to say anything meaningful about the international system unless they have a way of comparing, on the one hand, the welfare of countries that gain from international intellectual property with, on the other hand, the welfare of countries that lose from international intellectual property. That can best be done by examining whether the development of international law reflects cooperative power or coercive power.

Not surprisingly, then, scholars approaching international intellectual property must triangulate using a mix of cooperation theory, power theory, and normative theory; each with its own limitations, but each bringing something valuable to help address the ambiguities in other approaches.

### *III. Realism, Liberalism, and Distributive Values*

Before summarizing how the individual papers in this symposium relate to this triangulation, we can also profit by looking more intensely at pairs of this triumvirate. Our conference also suggested interesting insights that come about if we look more intensely at the combination of just two of the three focal points, one with a lesson for international relations scholars and the other with a lesson for intellectual property scholars. In particular, the conference suggested that by putting the focal point of cooperation together with the focal point of power we can see the need to merge, within the umbrella of international relations theory, the perspectives of liberalism with the perspective of realism. And when we put together the focal point of power with the focal point of normative welfare, we can see the need to include distributive concerns explicitly in our analysis of the normative impact of international intellectual property law. Let me briefly summarize these points.

#### **A. The Merger of Liberalism and Realism: The Theory of Distributive Cooperation**

Traditionally, international relations theorists have seen themselves as following either liberal or realist approaches to international affairs; a division that roughly mirrors the contrast between the theories of cooperation and theories of power that I outlined above. International relations scholars in the liberal tradition have worked out the theory and implications of international cooperation, without having to worry about the normative impact of the cooperation, while realists think of the international system in terms of power, without paying much attention to how the cooperation that results from the power changes the power relationships. In this stylized view, liberalists concentrate on the analytics of cooperation, working out how and why states cooperate, form international institutions, and subject themselves to the constraints and opportunities of the international regime. They essentially work out the logic of collective action among states. Their hope is that international cooperation, by channeling rivalry into accepted boundaries with effective dispute resolution, will result in a stable system where war is unlikely.

Realists, on the other hand, work out the analytics of power. Their focus—and the endgame of the realist logic—is that what matters to a state

is relative power—that is, a state's power relative to other states.<sup>24</sup> For realists, cooperation is but an expression of power and is inherently unstable because when cooperation threatens the power relationships that are important to states, the cooperation will end.

It is common to assume that realists and liberalists could not coexist, and analysts in the two traditions are largely viewed to present competing theories of international relations. To a realist, international cooperation does not matter because it is always subservient to state interest, which always seeks to enhance a state's relative power. In the liberal tradition, cooperation matters because cooperation yields joint gains, and the search for joint gains can overcome a state's interest in relative power by changing the state's perception of its security interests.

But when we put the perspective of cooperation together with the perspective of power that arose from our conference, we can suggest that the logic of realism was never antagonistic to cooperation. Realism did not deny the ability of states to make treaties, to ease frictions, and to change their behavior in response to the behavioral changes in other states. To realists, cooperation is always possible and always in a state's interests—with one important proviso: the cooperation has to preserve, or increase, the relative power of the dominant players in order to give them the sense of security they need. In the realist view, a dominant state would always cooperate to improve the welfare of another state, provided only that it would gain by that cooperation more than the other state did—that is, as long as the cooperation secured, or enhanced, its relative power.

Naturally, when gains are evenly divided between a powerful and a powerless state, the powerless state gains relatively more than the powerful state. That will not, however, keep the logic of realism from allowing the powerful state to cooperate. In any dynamic system, the power of the Hegemon is constantly eroding (unless it is maintained by force). Accordingly, the powerful state will lose relative power if it does not cooperate; convergence is natural in a world where small states need to increase their power in order to protect their security. Accordingly, even a powerful state is faced with the possibility of losing its power if it does not cooperate with others. It will therefore cooperate in a way that slows down the natural erosion of its power, looking at that gain as an additional gain of cooperation.

Under this scenario, a powerful state will gain from cooperation in two ways: from the direct benefits of the cooperation and from slowing down the process through which it loses power. These gains may well make the relative gains from cooperation greater for the powerful country, even if the direct gains of cooperation are evenly divided.

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<sup>24</sup> See, e.g., KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* (1979); JOHN J. MEARSHEIMER, *THE TRAGEDY OF GREAT POWER POLITICS* 29-30 (2001); John J. Mearsheimer, *The False Promise of International Institutions*, 19 INT'L SEC. 5 (1995).

International intellectual property is important for international relations theory precisely because it demonstrates that cooperation can follow realist logic. For example, the United States faces significant economic competition and depletion of relative power from Europe, Japan, and emerging markets, yet, by directing cooperation toward knowledge goods—particularly those in which the United States has a competitive advantage—it can project its economic dominance longer than if there were no cooperation in knowledge goods. One can easily support the hypothesis that cooperation over international intellectual property results from the search for benefits that increase the power of the powerful states relative to states without power. Under this hypothesis, the United States is following realist logic when it advances the TRIPS agenda or the TRIPS plus agenda, for it is working to secure its relative benefits from intellectual property, and therefore securing its relative power and security in an area of great strategic importance (knowledge goods) and great wealth producing importance (revenues from knowledge goods). International intellectual property allows us to see that the logic of cooperation does not necessarily deny the logic of realism.

Liberalism and realism can therefore be seen as complimentary, rather than competing, theories; liberal theory notes the benefits of cooperation, while realist theory shows the limits of cooperation in overcoming the need to project and use power in the state interest.<sup>25</sup> In the liberal tradition—the happy face of globalization—the cooperation produces joint gains that make all states better off. In the realist tradition, the cooperation makes the dominant players better off faster than the less dominant players, or reduces the erosion of their dominance, and therefore serves the interests of the dominant players primarily. The dominant players, of course, write the ideology of post Cold War cooperation. Naturally, they emphasize the joint and reciprocal gains from cooperation. But the possible complementarity of realism and liberalism requires that we work out the analytics of power—that is, a metric for determining when the gains from cooperation are jointly shared (the pathology of cooperation) and when they are skewed in favor of one party over another (the pathology of power). We must have models that help us differentiate skewed gains from joint gains.

## **B. Distributive Aspects of Normative Welfare**

Just as we gain insight by looking at the relationship between cooperation and power, so too do we gain insight when we look at the relationship between power and normative welfare. What becomes clear when we contemplate international intellectual property is the need to make

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<sup>25</sup> A similar point is made in Jonathan D. Greenberg, *Does Power Trump Law?*, 55 STAN. L. REV. 1789, 1818 (2003) (noting the value of realist perspectives in reminding us that stable cooperative systems are nonetheless fragile).



sure that the design of international intellectual property regimes takes into account not only the efficiency gains from intellectual property regimes but also how those efficiency gains are distributed. The need to consider deliberately the distributional values that are implicated by the system becomes an important part of institutional design.

As I have commented elsewhere, when we think of the welfare aspects of intellectual property we normally do not think of the distributive dimension—that is, we do not think about how the gains and losses from policy design are distributed.<sup>26</sup> This is because we normally think of normative welfare within a country, where we can rely on the tax and spend power of government to address the distributive values that cannot be reached through the intellectual property system. If some people are too poor to have access to essential patented medicines, for example, the government can subsidize their purchase in order to provide access that the intellectual property system would otherwise deny. Moreover, some distributional values are embedded (almost invisibly) in those parts of intellectual property doctrine that provide access to those who would otherwise be hard pressed to pay for the property.<sup>27</sup>

In the international system, however, the institutional infrastructure for making such distributive decisions is missing; we have no institutional structure for making the welfare decisions that determine, across states, whether and how those who gain from a particular policy should compensate those who lose from the policy. Accordingly, in the international system, distributive values must be embedded in the international intellectual property system itself, through the provisions of intellectual property systems that provide for fair use or other access rights—otherwise these values will be ignored. Simply put, in the international arena, there is no good mechanism for taking into account the inability of poor countries to pay for the knowledge goods that they need in order to enhance their own welfare, and if distributional goals are to have any salience, the goals must be forthrightly addressed.

Indeed, as I made clear above, the configuration of the international lawmaking system is biased against distributive values. The United States negotiates out of its interest as it defines that interest, and there is no *a priori* reason why the United States should contemplate the impact of international policy on the poor in other countries when it decides what its interests are and how it should use its influence to shape international

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<sup>26</sup> Peter M. Gerhart, *Distributional Values and Institutional Design in the Provision of Global Public Goods*, in INTERNATIONAL PUBLIC GOODS AND INTELLECTUAL PROPERTY, *supra* note 3.

<sup>27</sup> For example, we can see distributional values at work in the first sale doctrine, which allows one who owns a copyrighted product to loan it to others—thereby making libraries possible. Libraries, in turn, serve as important sources of access for those who would otherwise not be able to pay for the copyrighted material.

policy. After all, the poor are not in the United States, so they do not make up a part of the polity that defines, through democratic representation, the United States' interest. The United States incorporates the interests of the poor abroad only when the interests of the poor become the interests of the United States, either because people within the United States represent the interests of these poor individuals or because helping the poor is in the interest of the United States. And, because bargaining power at the WTO is determined by the relative economic strength of each country, the poorest countries do not have the power to bargain to insure that access to knowledge goods is given sufficient priority.

The lesson for intellectual property scholars is clear. In the international arena, the distributive values that are likely to be affected by the design of the international intellectual property system must be explicitly identified and considered in the design of the system; they cannot be left to other institutional mechanisms.

#### *IV. This Symposium Issue*

Thus far, I have referred to the general themes that came out of our conference, presenting my interpretation, after reflection, of the many splendid contributions that went into the conference. Let me now move from the general to the particular, looking at the individual contributions to the conference that generated these reflections. In what way did the individual excellence of each of our participants contribute to and reinforce this particular understanding of the intersection between international relations theory and international intellectual property?

George Downs and Eyal Benvenisti, in their article *Distributive Politics and International Institutions: The Case of Drugs*, adopt the perspective of power, and point out that both international law and behavioral norms that are embedded in regimes are the product of interstate politics and are therefore the projection of power. Accordingly, we cannot fully understand either international law or international regimes if we do not see them as an exercise of power by states. Their analysis supports the notion that cooperation through either law or through regimes can be fully understood only by finding a way of assessing the power that underlies, and therefore continues to influence, the regime. Because they are conscious that power is neither one-dimensional nor directly measurable, professors Downs and Benvenisti seek a proxy measure that will help us understand the power that exists in the international system, and they come up with an ingenious proxy. By focusing on a country's ability to negotiate for lower prices on individual drugs when they buy directly from drug companies, they are able to observe a market price that reflects power—that is, a measure of the normative effects of having (or not having) power.

Peter Drahos, in his article *Securing the Future of Intellectual Property: Intellectual Property Owners and their Nodally Coordinated Enforcement Pyramid*, also approaches his subject from the perspective of power, but his concern is to show how a state with a strong interest in the foreign enforcement of intellectual property law is likely to organize itself, internally and with respect to the foreign country, to maximize the projection of its power. He thus explains why a powerful country has an interest in how other countries enforce intellectual property rights, how such a country sifts through and evaluates the variety of its domestic interests and overseas opportunities, and how a country focuses that interest in its relationships with other countries. His assumption is that countries that are strong intellectual property producers have the interest and incentive to seek stronger overseas enforcement of their rights. Such a country, however, needs a process for choosing which domestic interests to champion, and Professor Drahos uses a model of nodal governance to understand that process. Such a country also needs a process of negotiating with foreign countries to encourage their intellectual property vigilance, and Professor Drahos uses the model of enforcement pyramids to show how a country projects its power. Finally, such a country needs a process for anticipating and responding to attempts by the foreign country to change the relative balance of power, and Professor Drahos uses the theory of forum shifting to show how a country can change the mix of carrots and sticks that it uses by negotiating in various forums and across subject matter to keep coalitions from forming.

Professor Carlos Correa, in his article *Bilateralism in Intellectual Property: Defeating the WTO System for Access to Medicines*, follows up on this general line of analysis with a more particularized examination of forum shifting, looking at how the United States has used negotiations in the context of the Central American Free Trade Agreement to realign the normative commitments of the Central American countries to intellectual property, resulting in a new TRIPS-plus regime. He reviews in great detail the provisions in CAFTA that result in a TRIPS-plus regime, but then notices a curious fact—that in some respects the negotiation may also lead to enhanced intellectual property protection in the United States, suggesting that intellectual property owners in the United States are successfully able to use international negotiations to increase their power within the United States. This leads to the possibility of a continuing upward ratcheting of global intellectual property rights; as the value to United States rights holders increases, the incentive on the United States to seek to profit from that value abroad also increases, inducing the United States to seek even higher standards in the future.

Building on the insight that national intellectual property systems will increasingly be shaped by international developments, professors Dinwoodie and Dreyfuss continue their groundbreaking exploration of whether life under the TRIPS regime may preclude a country from

fashioning the balance between incentive and access that achieves their normative goals and reflects their unique conditions.<sup>28</sup> In their article *TRIPS and the Dynamics of Intellectual Property Lawmaking*, they explore an important aspect of the neo-federalism that is emerging under TRIPS—whether and to what extent international intellectual property law under TRIPS will inhibit a country from adjusting domestic intellectual property rights along different dimensions, creating greater protections along some dimensions while reducing protection along others. Their theme—that WTO dispute resolution must recognize the political realities within states, and not view legislation as a compilation of discrete mandates subject to individual review—suggests that normative welfare issues at the state level cannot all be solved through an international template, and that those interpreting the global obligations should be sensitive to the local context in which balances are struck.

Laurence Helfer, in his paper entitled *Mediating Interactions in an Expanding International Intellectual Property Regime*, moves in a complimentary direction by showing how our understanding of regime theory can be deepened if we comprehend how states use regimes to increase their power or decrease the power of those with whom they negotiate. Of the many important points that he makes in this and an earlier paper on regime theory,<sup>29</sup> two stand out in terms of the themes that I have drawn from our conference. The first is that states can move (or try to move) subject matter to new regimes as a way of changing the nature of the norms that are taken into account in thinking about the topic. Whereas TRIPS might be heavily weighted toward the incentive side of the balance (reflecting its origin in the industrial countries), by shifting subject matter to regimes that are more sensitive to distributional values (such as public health), countries may be able to restore some balance between incentive and access, and thus between efficiency values and distributional fairness.

Moreover, his paper makes clear that the decision to treat intellectual property as a subject matter for international negotiations, separate and apart from all the subject matter for which it has consequences (such as health, local culture, and education) was a “framing decision” that itself reflects the interests and values of the countries that have the power to frame issues in international negotiations. He successfully shows that regime theory rebuts the realist notion that international norms do not matter. He does not deny, however, the realist assumption that the search for relative power is one of the driving forces behind regimes and regime change.

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<sup>28</sup> There earlier work was Graeme B. Dinwoodie and Rochelle Cooper Dreyfuss, *International Intellectual Property Law and the Public Domain of Science*, 7 J. INT'L ECON. L. 431 (2004).

<sup>29</sup> Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1 (2004).

*V. Conclusion*

Our conference demonstrated why international intellectual property provides such a rich lens through which to view international relations. International intellectual property illustrates the stark contrast between the "have" states and the "have not" states. It provides a seemingly endless puzzle of causality—whether the "have not" states are poor because they have not had intellectual property systems or, on the other hand, whether they have not had intellectual property systems because they are poor. It focuses on important questions about the role of power in the international system and the resulting welfare effects when that power is used. International intellectual property gets each state deeply involved in the internal domestic policy of other states, and it does so in ways that apply uniquely to the forms of rights protected in intellectual property. Because international intellectual property harnesses the dispute resolution provisions of the WTO, it requires WTO members to honor the rule of law with respect to these rights, and makes intellectual property rights a legitimate focus of bilateral and regional negotiations, bringing international law into the core of state governance as it has never been before.

We hope that the papers presented in this symposium issue successfully present the range of thought that is important to understanding this new form of international cooperation and rivalry.